

ARAB-MALAYSIAN FINANCE BHD

a

v.

CHONG CHIN SHOONG

HIGH COURT MALAYA, IPOH
ABDUL AZIZ MOHAMAD J
[CIVIL SUIT NO: 22-71-1990]
11 DECEMBER 1997

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CIVIL PROCEDURE: *Service - Post, service by - Registered post - AR registered post - Whether different - Rebutting presumption of receipt - Whether must show impossibility of receiving letter - Whether bare denial sufficient - Letter returned to sender as “tidak dituntut” - Effect of*

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This was an appeal from the decision of the Senior Assistant Registrar ordering summary judgment against the defendant on a claim under a contract of guarantee.

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Clause 8 of the said guarantee (‘cl. 8’) provided that any notice of demand or request required or permitted to be made or given under the guarantee shall be in writing and shall be validly given if served personally on the defendant or sent by registered post to the defendant’s address and in the event of posting shall be deemed to have been received by the defendant within 48 hours after the time of posting.

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A letter of demand was sent to the defendant by AR registered post and was returned marked “tidak dituntut” on the envelope, together with an AR card which did not contain any acknowledgment of receipt.

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The issue in this appeal was whether the said letter of demand was properly served in accordance with cl. 8 so as to give rise to a cause of action against the defendant under the said guarantee.

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Held:

[1] There was no claim by the defendant that the letters were returned for such-and-such a reason or that the addresses were no longer occupied or that the defendant was not living there at the material time. The defendant merely said that he never received any letter of demand. The unavoidable implication was that there had been a refusal to claim or accept delivery.

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- a* [2] Clause 8 was a contractual provision regarding service devised for the convenience of the parties. It was a deeming provision whereby parties had agreed that, if the notice was sent by registered post, it shall be regarded as having been received within 48 hours after posting. They had agreed that proof of actual receipt would not be necessary.
- b* [3] In the present case, the fact that the letter came back marked “tidak dituntut” could not displace the deeming provisions in cl. 8 that the letter had been served. To allow it would be tantamount to allowing the defendant to frustrate the device by refusing to accept delivery of the letter.
- c* [4] To rebut the presumption of receipt as provided in cl. 8, the defendant must show circumstances that would have rendered it impossible for him to have received the letter of demand, for instance, at the time when the postal agent attempted to deliver the letter he was away on business or holiday and no one was in occupation at the addresses. A bare denial of
- d* having received the letter of demand would not do.
- [5] For the purpose of the question whether there was service under cl. 8, there was no difference between registered post and AR registered post. The latter is a variety of the former. In both systems, if the letter is not
- e* delivered or not claimed, it will be returned to the sender. Therefore AR registered post came within cl. 8.
- [6] Clause 8 applied to the service in this case and the letter of demand must, according to that clause, be deemed to have been received.

f [Appeal dismissed with costs.]

Cases referred to:

Amanah Merchant Bank v. Lim Tow Seng & Ors [1953] 2 MLJ 241 (*refd*)

Beer v. Davies [1958] 2 All ER 255 (*cit*)

Hewitt v. Leicester City Counsel [1969] 2 All ER 802 (*cit*)

g *MBf Finance Bhd v. Hasmat Properties Sdn Bhd & Ors* [1990] 1 CLJ 107 (*refd*)

Public Bank Bhd v. Rasatulin Holdings Sdn Bhd & Ors [1989] 1 MLJ 47 (*refd*)

R v. Appeal Committee of County of London Quarter Sessions, ex p Rossi [1956] 1 All ER 670 (*cit*)

R v. Kensington and Chelsea Rent Tribunal, ex p MacFarlane [1974] 3 All ER 390 (*cit*)

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Legislation referred to:

Interpretation Act 1889 [UK], s. 26

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For the plaintiff - Leong Mei Choon; M/s Choong Yik Son & Fiona Ghaus
For the defendant - Chan Kok Keong; M/s Chan & Assocs

Reported by Ling Hea Hoon

JUDGMENT

Abdul Aziz Mohamad J:

This is an appeal from a decision of the learned senior assistant registrar ordering summary judgment against the defendant on a claim under a contract of guarantee.

Clause 8 of the contract of guarantee provides as follows:

8. Any notice demand or request required or permitted to be made or given under this guarantee shall be in writing and shall be validly given if served personally on me/us or sent by registered post to my/our address below written and in the event of posting shall be deemed to have been received by me/us within forty-eight hours after the time of posting.

Both sides agree that the only issue in this appeal is whether a letter of demand was properly served in accordance with cl. 8 so as to give rise to a cause of action against the defendant under the contract of guarantee.

What happened was that the letter of demand was sent to the defendant by A.R. registered post. The letter was returned, marked “tidak dituntut” on the envelope, together with an A.R. card which did not contain any acknowledgment of receipt.

It is not disputed that copies of the letter were sent to two addresses and that they were the addresses of the defendant. It is not disputed that both the letters came back marked “tidak dituntut” on the envelopes. There has been no claim by the defendant that the letters were so returned for such-and-such a reason or that the addresses were no longer occupied or that the defendant was not living there at the material time. He merely said he never received any letter of demand. The unavoidable implication is that there had been a refusal to claim or accept delivery, which would, in a sense, make it true that the defendant never received the letter.

Clause 8 is a contractual provision regarding service. It is in the form of a deeming provision. By it, the parties agreed that, if the notice is sent by registered post, it shall be regarded as having been received within forty-eight hours after posting. That means they agreed that proof of actual receipt would not be necessary. It is a contractual device for the convenience of the parties. A party to such a device may not refuse to accept delivery, and then rely on

- a* proof of non-delivery to claim there has been no receipt, because that would be to frustrate the device that he has agreed to. He must be taken to have received the notice or whatever it was that was sent to him. So in this case the fact that the letter came back marked “tidak dituntut” cannot displace the deeming that it had been served, because to allow it to do so would be to permit the defendant, if he had chosen to do so, to frustrate the device by refusing to accept delivery of the letter. As I said, the inescapable implication is that in fact that was what happened.

- c* I do not have to decide whether, in law, it would be open to the defendant to rebut the presumption of receipt provided by cl. 8, because he has not attempted to do so. A bare denial of having received the letter of demand will not do. If at all it is open to him to rebut the presumption, he must show circumstances that would have rendered it impossible for him to have received the letter of demand, such as, for instance, that at the time when the postal agent attempted to deliver the letter he was away on business or holiday and no one was in occupation at the two addresses.

- e* At first, learned counsel for the defendant maintained that ordinary registered post was different from A.R. registered post and that since the plaintiffs had chosen A.R. registered post they had gone outside the scope of cl. 8 and therefore could not rely on the deeming provision of the clause. Later, however, after checking the postal legislation, he conceded that there was no difference but for the fact that, in the case of A.R. registered post, there is a requirement that the A.R. card be returned to the sender.

- f* In my opinion, for the purpose of the question whether there was service under cl. 8, there is no difference between registered post and A.R. registered post. The latter is a variety of the former. In both systems, if the letter is not delivered or not claimed, it will be returned to the sender. Therefore A.R. registered post comes within cl. 8.

- g* Learned counsel for the defendant cited two cases for the proposition that in the case of A.R. registered post there must be proof by the A.R. card that the addressee received the letter. That proposition cannot stand if A.R. registered post comes within cl. 8, as I think it does, because then the deeming of cl. 8 applies to exclude any requirement of actual proof of service. Nevertheless I feel I ought to say something about the two cases.

- h* In *Public Bank Bhd. v. Rasatulin Holdings Sdn. Bhd. & Ors* [1989] 1 MLJ 47, which was also a guarantee case, cl. 8 of the guarantee provided that service of the notice was to be by posting through the post and that the notice shall be deemed to be served on the day next following the posting. The notice was in fact sent by A.R. registered post but it came back endorsed “kembali
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tidak boleh dituntut”. It was held that the plaintiffs, by sending the notice by A.R. registered post, had varied cl. 8, thereby taking upon themselves the burden of showing that the A.R. card was returned acknowledged. So there had been no proper service. I think the rationale for the decision was that service by A.R. registered post did not fall within the scope of cl. 8, which provided for service by ordinary post, and therefore the presumption of service provided by the clause did not apply. In the present case, however, cl. 8 provides for registered post and I think A.R. registered post falls within its scope and therefore the presumption of service applies.

In *MBf Finance Bhd. v. Hasmat Properties Sdn. Bhd. & Ors* [1990] 1 MLJ 180, which was also a guarantee case, the clause about service provided for service by registered post, but the judgment does not say whether there was a deeming provision as to service. Apparently it was claimed that the letters of demand were sent by A.R. registered post, but the A.R. card in respect of the second defendant was not exhibited. The learned judge found the second defendant had not been served because of the absence of the A.R. card. That case may be distinguished on two points. First, it may be that the clause as to service had no deeming provision. Second, there was no A.R. card exhibited and maybe the learned judge was not satisfied that the letter had been sent at all.

Learned counsel for the defendant cited three English authorities: *R. v. Appeal Committee of County of London Quarter Sessions, Ex parte Rossi* [1956] 1 All ER 670; *Beer v. Davies* [1958] 2 All ER 255; and *R. v. Kensington and Chelsea Rent Tribunal, ex parte MacFarlane* [1974] 3 All ER 390. I do not propose to go into them because they concern a different area of law from the one with which I am here concerned. They concern service of a document by post under an Act of Parliament and the application of s. 26 of the Interpretation Act 1889. The service in those cases was service of a document in the enforcement or administration of public statutes. Here it is solely a question of interpreting the intention of the parties in a clause in a contract between themselves. Different considerations would apply.

Learned counsel for the defendant posted to me on two occasions, after submissions had closed, two cases. One is *Amanah Merchant Bank v. Lim Tow Seng & Ors* [1953] 2 MLJ 241, but the circumstances of that case were somewhat similar to those of the *Rasatulin* case and the rationale could be similar. It was a case of a notice being sent by A.R. registered post when the contract provided for ordinary post. Siti Norma Yaakob J (as she then was) was following her own decision in the *Rasatulin* case.

a The other case is *Robert Batcheller & Sons, Limited v. Batcheller* (All ELR Annotated, 5 May 1945, Vol. 1, p. 522), where, at p. 530, in connection with the word “deemed” in art. 3 of the articles of association of a company, the learned judge said:

b It is, of course, quite permissible to “deem” a thing to have happened, when it is not known whether it happened or not. It is an unusual but not an impossible conception to “deem” that a thing happened when it is known positively that it did not. To deem, however, that a thing happened, when not only is it known that it did not happen, but it is positively known that precisely the opposite of it happened, is a conception which to my mind, if applied to a subject-matter such as that of art. 93, amounts to a complete absurdity.

c That is all very well, and it is easy to appreciate the absurdity of the deeming in the circumstances of that case, where, although the article deemed the retiring directors to have been re-elected, it was positively known that the shareholders had refused to re-elect them. In the circumstances of this case, however, it is not absurd to deem that the letter of demand had been served.

d It was returned with the remark “tidak dituntut” and, as I said, the circumstances give rise to the implication that there had been a refusal to accept the letter. To refuse to give effect to the deeming provision would be to enable a party to a contract with a service provision such as cl. 8 here to frustrate the contractually agreed clause by refusing to accept service. It might have been a different matter if the letter had been marked “gone away” as in *Hewitt v. Leicester City Council* [1969] 2 All ER 802.

e In my judgment, cl. 8 applied to the service in this case and, in the circumstances of this case, the letter of demand must, according to that clause, be deemed to have been received. I dismiss the appeal with costs.

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